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No. 450

In the Supreme Court of the United States

OCTOBER TERM, 1958

H. B. WOLFSEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims is reported at 162 F. Supp. 403 and is printed as Appendix A of the petition for certiorari. The opinion of the Commissioner of the Court of Claims is not officially reported and is printed in Appendix B of the petition for certiorari.

JURISDICTION

The order of the Court of Claims dismissing the petition was entered on May 7, 1958. Petitioners' timely motion for a rehearing was overruled on July 16, 1958. The petition for a writ of certiorari was filed on October 14, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether the petitioners are entitled to recover damages in the Court of Claims for the alleged taking of water rights where petitioners have never been physically deprived of the return flows of irrigation water alleged to have been taken.

STATEMENT

The petitioners brought this action in the Court of Claims to recover compensation alleged to be due them for impairment of riparian rights resulting from the diversion of the natural flow of the San Joaquin River at Friant Dam and the substitution of an equivalent or better supply of Sacramento River water in its place (Fdg. 43). The diversion arises from the construction and operation of the Central Valley Project in California by the United States. This Court has recently decided cases involving this project in *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, and *Ivanhoe Irrigation District* v. *McCracken*, 357 U. S. 275. The construction and operation of the Central Valley Project are outlined by the Court of Claims in its Findings numbered 1 through 9 and 24 through 33 and are summarized in this Court's *Ivanhoe* opinion.

So far as here material the project uses San Joaquin River water originating above Friant Dam, which is upstream from petitioners, for irrigating land that did not previously have water and substitutes in its place surplus water brought in from the Sacramento River in the Northern part of Central Valley. This exchange began to operate in 1951 and petitioners

brought this suit in 1955. The Court of Claims held that the exchange did not give petitioners a right to compensation because "any impairment there may have been of plaintiffs' rights amounted at most to a technicality. There is no actual damage as a result of the deprivation of the San Joaquin waters and the substitution of the Sacramento waters" (Pet. App. 31).

The facts basic to this conclusion may be summarized as follows: Petitioner's lands are located from two to three miles from the low channel of the San Joaquin River (Fdg. 5). Their lands lie along Salt Slough extending approximately ¾ of a mile from the Slough (Fdg. 44). Lands now owned by petitioners had been declared by California courts in 1933 to be riparian to the San Joaquin River or its sloughs as then owned by Miller & Lux, Inc. (Fdgs. 14, 38). Such lands retained their riparian status when conveyed to petitioners (Fdg. 39). But their riparian rights are "subject and subordinate to the water rights" of their remote grantor, Miller & Lux, Inc., "whether such water rights be riparian, appropriative or prescriptive" to the end that Miller & Lux, Inc., its successors, subsidiary and affiliated companies "may use, enjoy and transfer said water rights, * * * without let or hindrance" from the grantees (Fdg. 35). The United States acquired by purchase and agreement for the exchange of waters from Miller & Lux, Inc., all their rights to the use of the water of the San Joaquin (Fdgs. 24–26). The United States has also acquired the appropriative and riparian rights of other owners, and in some cases negotiated a settle-

ment on the basis of a substitute supply of Sacramento River water (Fdg. 25).

Petitioners are not now demanding compensation for loss of either the direct surface flow or the overflow of San Joaquin River water. Rather petitioners' claims in this case are for the alleged loss of their rights in the return flow of irrigation water (Pet. App. 28). Prior to the Central Valley project there was virtually no direct flow in the river during the crucial summer months when the entire supply from the river was used by Miller & Lux, Inc., in the exercise of its superior water rights, for irrigation of croplands (Fdg. 21). During this crucial summer period the only supply available to the petitioners was the return flow which reached Salt Slough from irrigation water that had been distributed to lands upstream (Fdgs. 40, 41). Ever since the substitution of Sacramento for San Joaquin waters began, petitioners' lands have never been physically deprived, in whole or in part, of the return flows of irrigation water (Fdg. 43 (c)). It is virtually certain that the flows in Salt Slough will be of the same magnitude during the irrigation season so long as the great area of cropland lying generally upstream from petitioners' lands continues to be irrigated (Fdg. 43 (d)). The issue in this case is whether the rights of the petitioners to the return flow have been impaired because of the substitution of Sacramento for San Joaquin water.

The Court of Claims held that petitioners were not damaged because the return flow waters have continued and will, in the foreseeable future, co[illegible]e

unimpaired in quality or quantity. While agreeing that this was so, the trial commissioner had suggested that petitioners be given an opportunity to prove damage resulting from "technical impairment" of their claimed water rights. In this regard the Court of Claims held that petitioners "are not entitled to compensation for a legal technicality. They must first show that something of substance has been taken from them" (Pet. App. 31). The Court of Claims then remarked that petitioners declined the opportunity the Commissioner's solution would have afforded them. (See Brief for the Plaintiff in the Court of Claims, pp. 28–39.) With respect to loss of water rights under California law because of the water substitution, the Court of Claims noted that "No such superior right has been asserted against plaintiffs. None has been established under California law. We believe none exists" (Pet. App. 29).[1] The opinion concludes:

> The United States cannot withdraw from the commitment [to replace waters of the San Joaquin with waters from the Sacramento River] with impunity, and neither can it, with impunity, withdraw from any users such as plaintiffs the waters now supplied in substitution for waters formerly originating in the San Joaquin watershed. [Pet. App. 33.]

ARGUMENT

The decision of the Court of Claims is correct. The court held that no cause of action arises for

[1] As to the questionable nature of petitioners' claimed water rights see footnote at page 6 of opinion (Pet. App. 31).

what could be at most a mere technical taking without any actual damage. This Court has on past occasions sanctioned the dismissal of actions in the Court of Claims where, assuming that there had been a taking or not reaching the question, plaintiffs could not show actual damages. *Nortz* v. *United States,* 294 U. S. 317, 327; *Marion & Rye Valley R. Co.* v. *United States,* 270 U. S. 280, 282. The mere possibility of some future damage where there has been no present interference with plaintiff's property does not give rise to a cause of action. *United States* v. *Sponenbarger,* 308 U. S. 256, 267. But even assuming a taking and regardless of the forum, the maximum measure of damages in eminent domain cases is the loss which the owner has sustained. *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195.

The Court of Claims held the petitioners failed to establish that rights superior to theirs existed in the return flow of the substitute supply. In effect, petitioners assert they had "riparian" rights in the return flow so long as it was San Joaquin water. They assert this even while acknowledging the superior rights of others who sold their rights to the United States, to appropriate the entire natural flow of the river (Pet. 6). Presumably this right must have been to force upstream owners and appropriators to supply them with the return flow of San Joaquin water or collect damages. But now that these upstream owners and appropriators have sold their water rights to the Government and received in lieu Sacramento River water, petitioners contend they have lost their

"riparian" rights to the return flow. In substance the contention is that these upstream owners and appropriators who sold the San Joaquin water can now recapture and retain the return flow of the exchange water from the Sacramento and are no longer obligated to let it flow past petitioners' land.

Petitioners base their claim of a loss on the "foreign waters" doctrine of California. Petitioners cite this rule as holding that riparian rights attach only to the natural flow of the stream and that they cannot complain if they are deprived of water which would not "in the course of nature" reach their land (Pet. 16). The Court of Claims distinguishes the "foreign waters" cases relied on as not being parallel because none of them involved the complete diversion of a natural stream accompanied by a guaranteed substitution of an equal amount of other waters (Pet. App. 29–30). The court remarked that, if California courts would have recognized "riparian" rights to the return flow of irrigation water in the first place, they may, if called upon to do so, recognize "riparian" rights in exchange waters also. (See note, Pet. App. 31.) [2]

The Court of Claims concluded that the United States was committed "to replace the waters of the San Joaquin River with waters from the Sacramento River, and with specific reference to the area of plaintiffs' lands (the Northern San Joaquin Valley), * * *.

[2] Petitioners emphasize they are willing to trade their "riparian" rights for a contract by the United States guaranteeing them a supply of irrigation water (Pet. 5). Obviously the United States could not enter into any such agreement in view of the nebulous state of petitioners' rights.

Any future withdrawal of such waters would render the United States liable to respond with just compensation as fully as defendant would have been responsible to so respond if it had taken away the natural waters without making an equivalent substitution therefor" (Pet. App. 33). This is as complete a protection of petitioners' rights from any taking by the United States as the Court of Claims could have given them or as they were entitled to. The simple fact is that petitioners are receiving the same quantity and quality of water as they did before. Far from depriving them of such flow the United States, by stabilizing the San Joaquin, is giving them assurance of continued water supply.[3]

Clearly, the court below has not decided any issue of California law in a way that would conflict with applicable state law, or require the granting of the writ of certiorari by this Court.

[3] The petitioners' assertion that, since the decision of the court below, upstream appropriators have in fact contracted to sell a portion of the return flow to another person (Pet. 17–18) adds nothing to their claim. First, it does not appear that such a sale of San Joaquin water would not have been within the admittedly superior rights reserved by Miller and Lux. Second, if such a sale would have been a violation of petitioners' rights, it still may be. Third, the fact that action subsequent to the complaint has resulted in injury, assuming that it has, adds nothing to the right to recover on the complaint.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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